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No. 84-971

# In the Supreme Court of the United States

OCTOBER TERM, 1984

NICK KAPNISON, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether petitioner was deprived of due process of law by the trial court's exclusion of deposition testimony of petitioner's co-defendant, taken in a civil proceeding to which the United States was not a party.

2. Whether admission of testimony by petitioner's ex-wife violated the confidential marital communications privilege.

3. Whether the trial court selectively enforced the confidential marital communications privilege.

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINION BELOW

The opinion of the court of appeals (Pet. App. a1-a25) is reported at 743 F.2d 1450.

### JURISDICTION

The judgment of the court of appeals was entered on September 4, 1984. A petition for rehearing was denied on October 22, 1984. The petition for a writ of certiorari was filed on December 19, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

Following a jury trial in the United States District Court for the District of New Mexico, petitioner was convicted on one count of conspiring to impede the United States in its collection of income taxes, in violation of 18 U.S.C. 371; one count of making a false tax return, in violation of 26

U.S.C. 7206(1); six counts of participating in the misapplication of funds of a bank insured by the Federal Deposit Insurance Corporation, in violation of 18 U.S.C. 656; and seven counts of participating in a loan kickback scheme, in violation of 18 U.S.C. 215. Petitioner was sentenced to two years' imprisonment on the conspiracy count. In addition, he was fined $10,000 on the conspiracy count and $5,000 each on the tax count and one of the banking counts. Petitioner's sentences on the remaining counts were suspended in favor of five years' probation, conditioned on performance of certain community service requirements.[1]

1. The evidence at trial showed that petitioner, an Albuquerque, New Mexico businessman, along with Ben Bronstein, the owner of the First National Bank of Clovis, and Henry Harenberg, the president of the bank, conspired to obtain loans for various borrowers, received kickbacks from the borrowers, and divided the kickbacks among themselves without correctly reporting their respective incomes. Petitioner or Bronstein would initiate the loans, petitioner would guarantee or broker the loans and receive a fee from the proceeds of the loans, and Harenberg would cause the loans to be approved. The proceeds of the fees paid to petitioner were divided among the three.

Petitioner was tried separately from his co-conspirators. Prior to petitioner's trial, Bronstein filed an affidavit stating

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[1]Petitioner's co-conspirator Henry Harenberg was convicted at a separate trial on most of the same counts as petitioner. Harenberg was sentenced to 18 months' imprisonment on the conspiracy count and was fined $10,000 on the conspiracy count and $5,000 each on a tax count and one of the banking counts; his sentences on the remaining counts were suspended in favor of five years' probation, conditioned on performance of certain community service requirements. Co-conspirator Ben Bronstein pleaded guilty to four counts of the indictment; he was sentenced to a two-year term of imprisonment and a total of $20,000 in fines.

that if called to testify he would invoke his Fifth Amendment privilege and refuse to testify on behalf of petitioner. The government conceded that Bronstein was "unavailable" within the meaning of Fed. R. Evid. 804(a)(1). Pet. App. a15. During his trial, petitioner attempted to offer in evidence the transcript of a deposition of Bronstein, which had been taken during the course of a civil action then pending in state court. In that civil action, the First National Bank of Clovis had sued a borrower who had defaulted on a loan he had obtained by paying a kickback to petitioner, Bronstein, and Harenberg. In the deposition, Bronstein denied working on the loan or receiving any benefit in connection with the making of the loan. The district court excluded the deposition from evidence. *Id.* at a15-a16.

At trial, a number of witnesses testified against petitioner, including his ex-wife Natalyn Kapnison. The trial court ruled that Mrs. Kapnison could testify about acts, petitioner's statements made in the presence of third parties, and her own statements, but not about anything petitioner related to her during the course of their marriage (Pet. App. a7-a8). Direct and cross-examination were confined to these matters (*id.* at a8). At the conclusion of her testimony, Mrs. Kapnison asserted the marital communications privilege with respect to any confidential communications she had made to petitioner during their marriage (8 Tr. 1480-1481).

2. The court of appeals affirmed petitioner's convictions (Pet. App. a1-a25). The court held that Mrs. Kapnison testified voluntarily and that her testimony did not violate either the privilege against adverse spousal testimony or the privilege for confidential marital communications (*id.* at a3-a10). The court further held, inter alia, that the trial court did not err in denying petitioner's motion for severance of some counts (*id.* at a10-a11); that petitioner was not

unfairly prejudiced by pretrial publicity (*id.* at a11-a12); that the trial court properly applied the privilege for confidential marital communications (*id.* at a13); that charts and summary testimony of an expert witness for the government were properly admitted (*id.* at a13-a15); that the trial court properly excluded from evidence the deposition testimony of Bronstein (*id.* at a15-a18); and that there was sufficient evidence in the record to support the convictions (*id.* at a22-a23).[2]

## ARGUMENT

1. Petitioner contends (Pet. 11-14) that the exclusion of co-conspirator Bronstein's deposition testimony deprived him of due process of law. Petitioner did not allege below that exclusion of the testimony amounted to a constitutional violation. See Appellant's C.A. Opening Br. 60-68; 13 R. 2482-2483. In any event, his contention is without merit.

Bronstein's deposition was taken in a civil proceeding involving the First National Bank of Clovis and one of its borrowers. The United States was not a party to that proceeding. In the course of his deposition Bronstein denied that he had participated in the processing of the loan at issue in the civil case or that he had derived any benefit from the loan.

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[2]Judge Logan and District Judge Jenkins, sitting by designation, concurred, but declined to join in Judge Barrett's application of the "crime-fraud" exception to the confidential marital communications privilege, citing their concurring opinions in *United States* v. *Neal*, 743 F.2d 1441 (10th Cir. 1984), cert. denied, No. 84-5951 (Mar. 25, 1985). Judges Logan and Jenkins concluded that petitioner's claim based on the privilege was without merit because the testimony he challenged did not involve confidential marital communications. Pet. App. a24-a25.

In *Neal*, the same panel rejected a claim that the confidential marital communications privilege had been violated. As in this case, Judge Barrett rested his conclusion on application of the crime-fraud exception to the privilege, while Judges Logan and Jenkins concluded that the testimony involved did not involve confidential marital communications.

It is clear that Bronstein's deposition testimony was not admissible under Fed. R. Evid. 804(b)(1); indeed, petitioner does not contend otherwise. Rule 804(b)(1) provides that former testimony is not excluded by the hearsay rule "if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." The plain language of the rule precludes the use of prior testimony when the party against whom the evidence is offered did not have a meaningful opportunity in the prior proceeding to develop that testimony. See, *e.g., United States* v. *Lanci*, 669 F.2d 391, 394 (6th Cir.), cert. denied, 457 U.S. 1134 (1982); *Government of the Canal Zone* v. *P. (Pinto)*, 590 F.2d 1344, 1353-1354 (5th Cir. 1979); *United States* v. *Wingate*, 520 F.2d 309, 315-316 (2d Cir. 1975), cert. denied, 423 U.S. 1074 (1976). Since the United States was not a party to the civil proceeding in which Bronstein's deposition was taken, it had no opportunity to cross-examine him. Thus, the deposition testimony constituted inadmissible hearsay as against the government.

Petitioner nevertheless contends that the Bronstein deposition testimony should have been admitted because it bore sufficient indicia of reliability. In support of that contention, he relies on *Chambers* v. *Mississippi*, 410 U.S. 284 (1973); *United States* v. *Benveniste*, 564 F.2d 335 (9th Cir. 1977); and *Zeigler* v. *Callahan*, 659 F.2d 254 (1st Cir. 1981). However, *Chambers* and *Benveniste* both involved declarations against penal interest. Such declarations generally are regarded as reliable because persons do not normally make statements that are damaging to themselves unless they believe them to be true. See *Chambers*, 410 U.S. at 299; Fed. R. Evid. 804(b)(3) advisory committee note. Bronstein's self-serving deposition testimony, in which he merely denied his involvement in the crime, clearly does not

bear the same indicia of reliability as a declaration against interest. Compare, *e.g.*, *United States* v. *Wingate*, 520 F.2d at 316.

Nor does *Zeigler* v. *Callahan* support petitioner's contention. There the court of appeals held that, assuming the admissibility of grand jury testimony of an absent witness who denied his involvement in the crime, the trial court's failure to admit that testimony was harmless error in light of the strength of the government's evidence and because it was most unlikely that the jury would have believed the absent witness's self-serving account. 659 F.2d at 270. Here, as in *Zeigler*, admission of the testimony at issue would not have affected the outcome of the case. Numerous witnesses testified concerning petitioner's participation in the kickback scheme, while both petitioner and Harenberg testified that they had not engaged in any wrongdoing. Admission of Bronstein's similar self-serving denials would have added little to petitioner's defense.[3]

2. Petitioner also contends (Pet. 14-18) that admission of testimony by his ex-wife violated the privilege for confidential marital communications.[4] Petitioner does not specify

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[3]Petitioner suggests (Pet. 13-14) that the courts are divided concerning admissibility under various hearsay exceptions (*e.g.*, Fed. R. Evid. 804(b)(5)) of grand jury testimony and testimony given at a preliminary hearing. This case does not involve those categories of testimony. Moreover, petitioner's counsel did not seek to introduce the Bronstein testimony on grounds other than Rule 804(b)(1). See 13 Tr. 2482-2484; Fed. R. Evid. 103(a); Fed. R. Crim. P. 51. In any event, the cases cited by petitioner are not in conflict; the outcomes rested primarily on the courts' differing evaluations of the reliability of the testimony in each case. Here the government's lack of opportunity to cross examine Bronstein, the self-serving nature of his testimony, and the absence of significant corroborating evidence establish that Bronstein's testimony did not bear sufficient indicia of reliability to be admissible, even if petitioner's counsel had sought its admission under Rule 804(b)(5).

[4]Petitioner and his ex-wife were married during the time of the events described in the indictment.

what portions of his ex-wife's testimony he regards as having violated the privilege. However, in the court of appeals he objected primarily to Mrs. Kapnison's testimony about the splitting of the loan fees among Bronstein, Harenberg, and petitioner (see Pet. App. a8-a9). This Court has recognized the existence of a privilege for confidential marital communications. See *Trammel* v. *United States,* 445 U.S. 40, 45 n.5, 51 (1980). The court of appeals correctly concluded, however, that the privilege does not apply in the circumstances of this case.[5]

The privilege may shield the acts of a spouse from disclosure if those acts were intended to be communicative and confidential. See, *e.g.,* 8 J. Wigmore, *Wigmore on Evidence* § 2337, at 657-658 (McNaughton reved. 1961). But the privilege does not prevent a witness-spouse from testifying about noncommunicative acts she has observed or about conversations that took place in the presence of third parties. See, *e.g., Pereira* v. *United States,* 347 U.S. 1, 6-7 (1954); *Wolfle* v. *United States,* 291 U.S. 7, 14-15 (1934). The trial court in this case specifically ruled that Mrs. Kapnison would not be allowed to testify about anything petitioner related to her outside the presence of third parties during the course of their marriage; the court concluded that Mrs. Kapnison "can testify as to acts. She can testify as to statements that were made in the presence of others * * *. She also may testify as to anything that she may have said, but not in a manner that would repeat what [petitioner] had

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[5]Even if the privilege might have applied in this case, it is doubtful whether petitioner preserved it. At the trial of co-conspirator Harenberg, which was held approximately a month before petitioner's trial, Mrs. Kapnison testified to several private conversations with petitioner. Petitioner did not invoke the privilege in an attempt to prevent his ex-wife from testifying at Harenberg's trial. Thus, it is at least arguable that petitioner waived his privilege. Compare *United States* v. *Fisher,* 518 F.2d 836, 840-841 (2d Cir.), cert. denied, 423 U.S. 1033 (1975).

told her or would indicate the answer or statement that [petitioner] had made to her." Pet. App. a7-a8. That ruling was enforced throughout the trial (*id.* at a8). Mrs. Kapnison testified, inter alia, that she attended meetings with Bronstein, Harenberg, and petitioner at which she participated in distributing the loan fees and that she herself withdrew large amounts of cash from the bank and distributed pro rata shares of the loan fees to Bronstein and Harenberg (*id.* at a8-a9). Judges Logan and Jenkins concluded (*id.* at a24-a25) that Mrs. Kapnison's testimony did not involve any confidential communications. That fact-bound conclusion, which is fully supported by Judge Barrett's description of Mrs. Kapnison's testimony (*id.* at a8-a9), does not warrant review by this Court.

Assuming arguendo that Mrs. Kapnison's testimony concerned confidential marital communications, it nevertheless was admissible under the "crime-fraud" exception to the privilege. Under that exception, confidential marital communications are not protected by the privilege if they are made in furtherance of joint criminal activity of the spouses. *See, e.g., United States* v. *Sims,* No. 82-1523 (6th Cir. Feb. 28, 1985), slip op. 8-9; *United States* v. *Broome,* 732 F.2d 363, 365 (4th Cir. 1984), cert. denied, No. 84-118 (Oct. 1, 1984); *United States* v. *Ammar,* 714 F.2d 238, 257-258 (3d Cir.), cert. denied, 464 U.S. 936 (1983); *United States* v. *Entrekin,* 624 F.2d 597, 598 (5th Cir. 1980), cert. denied, 451 U.S. 971 (1981); *United States* v. *Price,* 577 F.2d 1356, 1364-1365 (9th Cir. 1978), cert. denied, 439 U.S. 1068 (1979); *United States* v. *Mendoza,* 574 F.2d 1373, 1379-1381 (5th Cir.), cert. denied, 439 U.S. 988 (1978); *United States* v. *Kahn,* 471 F.2d 191, 194-195 (7th Cir. 1972), cert. denied, 411 U.S. 986 (1973), rev'd on other grounds, 415 U.S. 143 (1974). Cf. *Clark* v. *United States,* 289 U.S. 1, 15 (1933) (describing crime-fraud exception to attorney-client privilege). Contrary to petitioner's suggestion, there is no disagreement among the courts of appeals concerning the existence of this

exception to the marital communications privilege.[6] This Court recently declined to grant review on this issue in a case decided by the same panel that decided this case. *Neal* v. *United States*, No. 84-5951 (Mar. 25, 1985). See page 4 note 2, *supra*. The present case, in which (as in *Neal*) only one member of the panel relied on the crime-fraud exception, clearly does not call for a different disposition.

3. Petitioner contends finally (Pet. 17-18) that the district court violated his due process rights by selectively enforcing the confidential marital communications privilege, thereby preventing him from confronting his ex-wife. He also suggests (*id.* at 11) that Mrs. Kapnison's answers to certain questions constituted a waiver of the privilege, but that she was then permitted to use the privilege to prevent petitioner from testifying about confidential communications. Those contentions are without merit.

Petitioner's claim of selective enforcement rests on the incorrect premise that his ex-wife was permitted to testify in violation of the marital communications privilege. As we explained above (page 7), the trial court strictly enforced its ruling barring Mrs. Kapnison from disclosing any confidential marital communications. Moreover, petitioner had ample opportunity to confront his ex-wife; his counsel cross-examined Mrs. Kapnison at considerable length. See 8 R. 1352-1472. And contrary to petitioner's present

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[6]In support of his contention that there is a conflict among the circuits on this point, petitioner cites *Appeal of Malfitano*, 633 F.2d 276 (3d Cir. 1980). However, the court in *Malfitano* declined to adopt a crime-fraud exception only with respect to the separate privilege against adverse spousal testimony. See also *In re Grand Jury Subpoena, United States of America, Hana Koecher*, No. 85-1033 (2d Cir. Feb. 28, 1985), petition for rehearing pending. As petitioner acknowledges (Pet. 14-15), subsequent to *Malfitano* the Third Circuit expressly recognized a crime-fraud exception to the confidential marital communications privilege. *United States* v. *Ammar*, 714 F.2d at 257-258.

contention, Mrs. Kapnison did not waive the confidential marital communications privilege during her testimony. In cross-examining Mrs. Kapnison, petitioner's counsel himself took particular care to ensure that the privilege remained intact. See 8 R. 1381-1383, 1458-1459, 1462. In any event, petitioner has identified no specific prejudice that he suffered as a result of the alleged selective enforcement. In this Court, as in the courts below (see Appellant's C.A. Opening Br. 46-52; 13 R. 2543-2544), petitioner has made no proffer concerning communications to which he might have testified if his ex-wife had been barred from asserting the confidential marital communications privilege. Thus, he has failed to present an adequate foundation for his selective enforcement claim.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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